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In the Supreme Court of the United States

OCTOBER TERM, 1979

PETER MARCELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is not reported. An earlier opinion of the court of appeals is reported at 570 F. 2d 324.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1980 (Pet. App. A7-A8). A petition for rehearing was denied on March 27, 1980 (Pet. App. A9-A10). The petition for a writ of certiorari was filed on April 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the stop of petitioner's truck and its transfer to the nearby state police headquarters to investigate a tip that it had been stolen violated the Fourth Amendment.

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of interstate transportation of a stolen vehicle, in violation of 18 U.S.C. 2312.[1] He was sentenced to a five-year term of imprisonment. The court of appeals affirmed (Pet. App. A1-A6).

The evidence adduced at a suppression hearing showed that on October 5, 1976, the FBI in New York received an anonymous telephone tip that petitioner was a former resident of New York who now operated the A-1 Carting Company in Albuquerque, New Mexico, using some equipment that had been stolen in New York (Tr. 60-64).[2] That information was communicated to FBI Agent James Doyle in Albuquerque. Agent Doyle verified that petitioner operated the A-1 Carting Company and that he had previously been a New York resident, but he was unable to confirm that petitioner was using stolen equipment in his business (*ibid.*).

Thereafter, on October 24, 1976, the New Mexico State Police received an anonymous telephone tip that petitioner was in New York in possession of a stolen garbage truck, that the truck had a new paint job and altered serial numbers, and that petitioner would be driving that truck to New Mexico, arriving there on October 27, 1976, via Interstate 40 (Tr. 64-65, 129-130). Agent Doyle was advised of that information the following day. He then telephoned petitioner's New

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[1]Petitioner had been tried once before on that charge, but that trial ended in a mistrial when the jury was unable to reach a verdict (Pet. 3).

[2]"Tr." refers to the transcript of the suppression hearing held on December 7, 1976.

Mexico residence and was told that petitioner was out of town, but was expected back on October 27th (Tr. 65).

On the afternoon of October 27, 1976, Agent Doyle contacted New Mexico port of entry officials and asked to be notified if a garbage truck with a compacter unit entered the state (Tr. 66). A few hours later, Doyle was notified that a garbage truck with a green cab driven by petitioner had just entered the state and was en route westward towards Albuquerque on Interstate 40 (Tr. 66-68). Thereupon, Agent Doyle alerted the New Mexico State Police about the information concerning petitioner's garbage truck and requested that they be "on the lookout" for it (Tr. 67, 106).

At approximately 10:30 that night, police officer A. C. Rodriguez spotted the garbage truck on Interstate 40 entering Albuquerque and stopped it (Tr. 105-109). At that time, Benjamin Dante, an employee of petitioner, was driving and petitioner was a passenger (Tr. 108). Officer Rodriguez asked Dante for his driver's license and inquired about the vehicle's ownership (*ibid.*). Petitioner responded that he was the owner and produced his driver's license and registration (*ibid.*). Officer Rodriguez's efforts to inspect the truck, however, were impeded by the cold, wind and snow; he testified that he was not even able to see the vehicle's license tag because of the weather and because the light that was supposed to illuminate it was not working (Tr. 106, 118). Accordingly, Officer Rodriguez asked petitioner if he and Dante would drive the truck to state police headquarters, which was located less than one-half mile away (Tr. 106, 108), so that the truck could be checked further. Officer Rodriguez testified that petitioner agreed, stating that would "[b]e no problem" and that he would have Dante drive the truck (Tr. 108, 112-113). Dante then drove the truck to

headquarters, while petitioner rode in Officer Rodriguez's car (Tr. 120-122). Petitioner testified that he accompanied Officer Rodriguez to police headquarters because he was told to do so, and he felt that he had no choice other than to comply with the request (Tr. 144, 156-157).

The group arrived at police headquarters about three or four minutes later and was met there by Agent Doyle, who had been in radio contact with Officer Rodriguez (Tr. 92, 109, 116-117). Doyle, together with a representative of the National Automobile Theft Bureau (a private organization funded by insurance companies), inspected the truck. They observed that the truck appeared to be much newer than a 1973 Peterbilt, which was the model listed on the registration produced by petitioner, and that the odometer registered only 6,800 miles.[3] They also observed that part of the cab appeared to have been repainted, that the truck's identifying emblem was missing, that the serial number plate was attached to the door in an unusual manner, that the vehicle's serial numbers had been "filed down and restamped," and that the numbers were not in the right place (Tr. 69-78, 127-134, 139-140).

Thereupon, Agent Doyle told petitioner that he was not under arrest, but that the officers were investigating the possibility that the truck in his possession had been stolen. Agent Doyle then advised him of his *Miranda* rights, and petitioner signed a form acknowledging the warnings (Tr. 84). Agent Doyle informed petitioner that "due to the weather conditions and the time of night," it

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[3]The police subsequently executed a search warrant for petitioner's property, where they located parts of a 1973 Peterbilt truck. The validity of that search was upheld by the court of appeals after the district court had originally suppressed the evidence seized. 570 F. 2d 324 (1978).

was necessary to retain the truck to determine if it had been stolen (Tr. 80-81).[4] Petitioner responded that that was perfectly all right with him (Tr. 80-81, 87). He claimed that he had purchased the cab of the truck from the City of Albuquerque four months earlier, that he had sent the cab to Philadelphia to be fitted with a garbage compacter, and that it had been there for about a month (Tr. 81-82). Dante stated that the truck had been in Philadelphia for a month, adding that he and petitioner had flown there to pick it up (Tr. 110). The truck's inspection sticker, however, indicated that it had been inspected in New Mexico five days earlier (Tr. 82, 110). Petitioner was then told that he would be contacted when the examination of the truck had been completed, and he and Dante were driven home (Tr. 82-83). They had been at police headquarters for about an hour (Tr. 111).

The district court declined to suppress the statements petitioner had made at police headquarters or the evidence derived from the inspection of the truck (Pet. App. A12-A13), and the court of appeals affirmed (*id.* at A1-A6). The court of appeals held that the initial investigative stop of the truck was justified on the basis of the tip that it had been stolen and that petitioner consented to the request that the truck be driven to police headquarters for further inspection (*id.* at A3).

ARGUMENT

1. Petitioner contends (Pet. 14-20) that no reasonable suspicion of criminal activity existed to justify the initial stop of the truck on the highway. This contention is without merit.

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[4]Further investigation later revealed that the truck was a 1976 model Crane Carrier that had recently been stolen in New York (Tr. 70; Pet. App. A3).

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court established that an individual may be detained briefly for investigative purposes upon a reasonable suspicion that he is engaging in criminal activity. See also *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880-882 (1975). Petitioner contends (Pet. 17, 19), however, that the tip alerting the authorities that petitioner was bringing a stolen truck into New Mexico did not provide the officers with sufficient reasonable suspicion to justify an investigative stop because the tip had not been adequately corroborated. Because the police were not aware of how the informant acquired his information and had no prior evidence of his reliability, it is true that the tip alone did not provide the officers with probable cause to arrest petitioner under the standards of *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Aguilar* v. *Texas*, 378 U.S. 108 (1964). The standard of reasonable suspicion required for an investigative stop, however, does not approach that of probable cause, and, as petitioner acknowledges (Pet. 15 & n.9), an informant's tip that is not sufficiently reliable to provide probable cause may nevertheless provide reasonable suspicion. See *Adams* v. *Williams*, 407 U.S. 143, 147 (1972); *United States* v. *Sierra-Hernandez*, 581 F. 2d 760 (9th Cir.), cert. denied, 439 U.S. 936 (1978).[5]

The tip in this case was not a vague suggestion of criminal activity, but a notification of a specific criminal act. It identified petitioner and his company and specified the date upon which the stolen truck would be brought into New Mexico and the highway that would be used. Moreover, in this case the police had substantially corroborated the information contained in the tip, enhancing its reliability. They had confirmed that

[5]Accordingly, those cases cited by petitioner (Pet. 18-20) involving probable cause are inapposite.

petitioner was engaged in the garbage business and had previously resided in New York. They had learned that petitioner was out-of-town and was expected back on October 27th. When petitioner entered New Mexico with a garbage truck on the date and by the route specified by the informant, the police surely had sufficient reason to suspect that it was stolen, as the informant asserted, and to justify an investigative stop of the truck. Thus, the court of appeals correctly held that the tip was "sufficiently corroborated to justify the stopping of the truck" (Pet. App. A3).[6] Indeed, in our view, given the unusual nature of the tip and its corroboration, we believe that the court of appeals could, had it been necessary, properly have found probable cause. See *Draper* v. *United States*, 358 U.S. 307 (1959).

2. Petitioner also contends (Pet. 8-13) that the movement of petitioner to the police station constituted an arrest that required probable cause under this Court's decision in *Dunaway* v. *New York*, 442 U.S. 200 (1979). This specific contention was not made in the court of appeals, where petitioner contended generally that the "stop and seizure of the * * * truck * * * was * * * with-

[6]Petitioner's claim (Pet. 17) that the decision of the court of appeals conflicts with *United States* v. *McLeroy*, 584 F. 2d 746 (5th Cir. 1978), is without foundation. In *McLeroy*, the court held that, on the facts of that case, an informant's tip alone did not provide the police with reasonable suspicion to justify an investigative stop. The court acknowledged that the corroboration of innocent details could give a tip the reliability needed to justify a stop, but ruled that no such corroboration existed in that case. The only information that the police were able to corroborate in *McLeroy* was the suspect's name and address and the description of his automobile—information readily available to many people. Here, by contrast, the informant's information that petitioner would be returning to New Mexico on October 27 and that a garbage truck would be brought into the state on that date on Interstate 40 was corroborated.

out probable cause or such exigent circumstances which might amount to an articulable reason for an investigative confrontation" (C.A. Br. 37), and it should not be considered here for the first time. In any event, the contention is without merit.

First, the court of appeals found (Pet. App. A3) that petitioner consented to a request by Officer Rodriguez to go to the police station, although no finding in this regard was made by the district court.[7] Since the officer had sufficient grounds to justify stopping petitioner's truck, he did not need probable cause to request that petitioner come in out of the weather to permit further inspection of the truck. See *United States* v. *Mendenhall*, No. 78-1821 (May 27, 1980), slip op. 11-12. The factual conclusion that petitioner consented to this request is supported by the record.[8] There was no evidence that petitioner was

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[7]No specific contention was made before the district court that the character of the encounter changed when petitioner went to police headquarters, so a specific finding as to consent was not called for. Because the evidence in question was obtained at headquarters, it is apparent that the district court found the entire encounter to be one "investigative confrontation" that did not require probable cause (Pet. App. A12-A13).

[8]Petitioner contends (Pet. 12-13) that there was no valid consent here because petitioner was not advised that he could refuse to give consent and because the police allegedly intended to take him to headquarters whether or not he consented. These contentions are without merit. A consent may be effective if it is voluntary in the totality of the circumstances even if a person is not advised of his right to refuse consent. See *United States* v. *Mendenhall*, *supra*, slip op. 10; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 234 (1973). As to the second point, the record does not reveal whether the police intended to take petitioner to headquarters against his will. In any case, the policemen's subjective intentions are irrelevant to the voluntariness of petitioner's consent. See *United States* v. *Mendenhall*, *supra*, slip op. 9 n.6; *Scott* v. *United States*, 436 U.S. 128, 136-137 (1978).

coerced in any manner to go to headquarters.[9] The fact-bound ruling of the court of appeals, which was not contested by petitioner below in either his brief or petition for rehearing, does not warrant further review.

In any event, even if petitioner did not consent to go to police headquarters, the short trip there was reasonable under the circumstances and did not constitute a detention equivalent to an arrest that requires probable cause. This Court has recognized that an individual may be asked to make some movement from the location at which he is stopped without any additional reason for suspicion other than the reasons that occasioned the stop. See *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976). See also *United States* v. *Wylie*, 569 F. 2d 62, 70-71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978). The relevant question is the reasonableness of the officer's conduct in the circumstances of the case. Here, petitioner's truck was stopped on the highway so that it could be examined to determine if it was stolen. Because of the weather conditions, it was impossible to examine the truck properly on the highway. Accordingly, the police requested that the truck be moved to police headquarters, which was less than one-half mile away, for examination there. This action, even if not consented to, was certainly reasonable under the circumstances; the only alternative would have been for the police to "shrug [their] shoulders" and permit petitioner to escape with a truck that

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[9]Indeed, there was testimony at the suppression hearing that petitioner treated the officer's request so casually that he got into the officer's car for the ride to headquarters without even being asked (Tr. 121-122).

they reasonable suspected to be stolen. Cf. *Adams* v. *Williams, supra*, 407 U.S. at 145.[10].

The situation in this case is not akin to that in *Dunaway* v. *New York, supra*. In that case, Dunaway was taken involuntarily to the police station solely for the purpose of interrogation. There was no justification for the move; he could just as well have been questioned at his neighbor's home, where he was found. The action of the police thus was not reasonable under the circumstances. Here, however, the police did not take petitioner to the station for interrogation purposes; they wished to examine the allegedly stolen truck, which they could not do on the highway. As a practical matter, of course, petitioner came to headquarters along with the truck rather than be left on the highway in a snowstorm. But the officers immediately began an examination of the truck when they arrived at headquarters rather than questioning petitioner.[11] Only after the examination of the truck confirmed their suspicions that it was stolen did the officers briefly question petitioner; then they drove him to

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[10]Contrary to petitioner's assertion (Pet. 10-11), there was clearly a risk that evidence of a crime would be lost if the police had permitted petitioner to take the truck to his business without further investigation. Indeed, it was later learned that, after he was released, petitioner took steps to conceal other evidence of the theft, which was recovered by the police pursuant to a search warrant. See *United States* v. *Marcello*, 570 F. 2d 324 (10th Cir. 1978).

[11]Petitioner's contention centers on his transfer to headquarters. Presumably, if the police had taken the truck to headquarters and petitioner had gone home instead, the examination of the truck would be unobjectionable. *Dunaway* does not purport to require probable cause for the movement of possessions. Yet had petitioner gone home, the outcome would have been no different. Examination of the truck would have revealed that it was stolen. Thus the evidence that the truck was stolen cannot be said to be the fruit of the trip of petitioner to headquarters.

his home. By that time, of course, the officers clearly had probable cause to believe that petitioner was transporting a stolen truck. The entire encounter at headquarters, most of which involved examination of the truck, took about an hour (Tr. 111). Moreover, the weather conditions made it essential to the purposes of the investigatory stop that the truck be moved from the road because it was impossible to examine it outside. The situation in this case thus bears little resemblance to *Dunaway*, where the detention for interrogation purposes was significantly longer and the trip to the police station completely unnecessary, and it cannot be characterized as an arrest of petitioner.[12]

Petitioner also suggests (Pet. 12-13) that probable cause was required to justify a "search" of the truck. In fact, there was no "search" of the truck pursuant to the stop. As the court of appeals found (Pet. App. A3-A4), the

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[12]The decision of the court of appeals is not in conflict with *United States* v. *Miller*, 589 F. 2d 1117 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979). In *Miller*, the defendant was stopped after a four-mile chase at high speed and taken to a marina a few miles away for questioning. The court stated that this trip to the marina, although not an arrest, was a detention that required more than the reasonable suspicion needed to justify an investigative stop; it ruled, however, that the police had probable cause to arrest the defendant at the time of the stop and affirmed the conviction. The determination that the police conduct went beyond an investigative stop turned on the facts of that case and does not conflict with the court's decision here.

Petitioner asserts (Pet. 10) that the court of appeals in *Miller* held that an arrest had occurred because the police had retained the defendant's driver's license when they went to the marina. This assertion reflects a misunderstanding of the *Miller* opinion. The court did rely on the fact that the police had retained the driver's license in finding that the defendant did not consent to go to the marina. It did not, however, thereby suggest that the restraint on movement caused by retention of the license constituted an arrest, since there is no question that even an investigative stop involves restraint of the suspect's movement.

testimony of the officers regarding evidence discovered at the station related only to evidence in plain view. See Tr. 69-73.

Moreover, although Officer Rodriguez did not arrest petitioner, it appears that he did have probable cause to do so at the time he requested petitioner to bring the truck to headquarters. The police had corroborated every detail of the tip except that they had not yet confirmed through examination that the truck was stolen. They had been tipped that petitioner would be driving a stolen garbage truck into New Mexico on October 27th using Interstate 40, and, in fact, they had confirmed that petitioner was driving a garbage truck into New Mexico by that route on October 27th. It was thus clear that the informant had reliable information that would not have been readily available to a casual gossip or rumor-monger. The police did not know for certain that the truck was stolen; it was possible that the informant knew only that petitioner would be bringing in a truck on October 27th and stated that it was stolen only to cause trouble for petitioner. But probable cause does not require that the police be certain that a suspect is engaged in criminal activity. Here, the degree to which the informant's tip had proven to be reliable made it more likely than not that the remaining detail of the tip, the claim that the truck was stolen, was also true.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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